SEREMBAN GOLF RESORT BHD A

v.

AMERFAB SDN BHD

HIGH COURT MALAYA, SEREMBAN B
LOW HOP BING J
[APPEAL NO: 12-35-2003]
12 DECEMBER 2005

CIVIL PROCEDURE: *Jurisdiction - Sessions Court - Whether plaintiff's claim constitute rescission under s. 69(b) of the Subordinate Courts Act 1948 - Whether within jurisdiction of Sessions Court* C

CIVIL PROCEDURE: *Summary judgment - Appeal against - Privity of contract - Absence of - Liability of second defendant - Whether an issue to be tried - Whether sessions court judge erred in entering summary judgment against second defendant* D

This was an appeal by the appellant/second defendant ('second defendant') against the decision of the sessions court judge entering summary judgment against the first and second E defendants under O. 26A of the Subordinate Courts Rules 1980. The plaintiff (purchaser), the first defendant (vendor) and the second defendant (registered proprietor of the lands) executed a sale and purchase agreement ('SPA'). The first defendant had under the SPA agreed to sell to the plaintiff a three storey shop F office unit ('the unit'). Clause 20 of the SPA provided that the time for handing over vacant possession should be within 24 months from the date of the SPA, failing which the first defendant should pay liquidated damages immediately to the plaintiff. The defendants failed to fulfill the obligations and the plaintiff G terminated the SPA and demanded repayment of RM60,000 paid by the plaintiff to the first defendant. The plaintiff thus obtained the aforesaid summary judgment against both the defendants. It was the second defendant's contention that the plaintiff had sought remedy of rescission which was outside the jurisdiction of H the sessions court on the basis of s. 69(b) of the Subordinate Courts Act 1948. The second defendant further raised the issue pertaining to the absence of privity of contract and that the second defendant was not a proper defendant in view of cl. 4 in the SPA. I

Held (allowing the appeal):

[1] The plaintiff's claim herein arose from its right as an innocent party to put an end to its future obligations under the SPA and so did not constitute a true rescission as provided for in s. 69(b) of the Subordinate Courts Act 1948. It was properly within the jurisdiction of the sessions court.

[2] The liability of the second defendant under the SPA was an issue which ought to be tried. The sessions court judge had erred in entering summary judgment against the second defendant.

[Setting aside order of the court.]

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Car & Universal Finance Co Ltd v. Caldwell [1961] 1 QB 525 ***(refd)***

Hospital Pantai Ayer Keroh Sdn Bhd v. Lu Wei Hong [2005] 4 MLJ 155 ***(refd)***

Mc Donald v. Dennys Lascelles Ltd [1933] 48 CLR 457 ***(refd)***

Johnson v. Agnew [1980] AC 367 ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170 ***(refd)***

Yap Sew Lim lwn. Pulau Kembara Sdn Bhd [2005] 7 CLJ 340 HC ***(refd)***

Legislation referred to:

Specific Relief Act 1950, Chapter IV
Subordinate Courts Act 1948, s. 69(b)
Subordinate Courts Rules 1980, O. 26A

For the plaintiff - Syuhaeda Aeni Mat Ali; M/s Azhar & Wong
For the defendants - S Chandrasegar Subramaniam; M/s Vijian Chandran & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-second defendant ("the second defendant") against the decision of the learned sessions court judge who had on 26 June 2003 entered summary judgment against both the defendants under O. 26A of the Subordinate Courts Rules 1980.

There was no appeal by the first defendant.

Factual Background

The plaintiff and both the defendants herein have executed a sale and purchase agreement on 27 May 1997 ("the SPA"), wherein the plaintiff was the purchaser, the first defendant Nusan Land Sdn Bhd the vendor and the second defendant the registered proprietor of the lands held under HS(D) 99118 Pt No. 18526, HS(D) 99119 PT No. 18527, and HS(D) 99120 PT No. 18528, all in the mukim of Ampangan, district of Seremban (collectively "the lands").

The second defendant has granted the first defendant the right to subdivide, develop and sell the lands as a commercial centre.

The first defendant has under the SPA agreed to sell to the plaintiff a 3-storey shop office unit No. D-76 with a land area of 2510 sq ft ("the unit") at a consideration of RM617,460.

Clause 20 of the SPA provides for the time for handing over vacant possession together with the connection of water and electricity supply to the unit within 24 months from the date of the SPA, failing which the first defendant shall pay liquidated damages immediately to the plaintiff.

As the defendants have failed to fulfil the obligations under cl. 20, the plaintiff has vide its solicitors' letter dated 11 December 2001 terminated the SPA and demanded repayment of RM60,000 paid by the plaintiff to the first defendant.

Vide letter dated 20 December 2001, the second defendant replied that it was in the midst of discussion with its banker to revive and restructure the project and that upon receipt of the green light from its banker which was expected within two months thereof, it would inform the plaintiff of its development plan and to resolve this matter amicably.

However, as nothing was done by the second defendant, the plaintiff has commenced this action and proceeded to obtain the aforesaid summary judgment against both the defendants.

A **Issue Of Rescission**

The second defendant's learned counsel Miss Syuhaeda Aeni binti Mat Ali contended that the plaintiff has sought the remedy of rescission which is outside the jurisdiction of the sessions court, on the basis of s. 69(b) of the Subordinates Courts Act 1948.

B

The response of the plaintiff's learned counsel Mr. S. Chandrasegar is that rescission was not sought by the plaintiff as it was a claim for the refund of money paid by the plaintiff after terminating the SPA.

C

The question before me is whether the plaintiff is seeking rescission of the SPA.

Section 69(b) of the Subordinate Courts Act 1948 provides, where relevant, as follows:

D

> Sessions court shall have no jurisdiction in actions, suits or proceedings of a civil nature:
>
> (a) …
>
> E (b) for … rescission of contracts.

In my judgment, rescission of contract must be distinguished from its termination. The judgment of Dixon J in *Mc Donald v. Dennys Lascelles Ltd*. [1933] 48 CLR 457 explained as follows:

F

1. When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract,
G but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected;

H

2. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be to the position they occupied before the contract was made; and

I

3. When a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

The above principles were affirmed in *Johnson v. Agnew* [1980] AC 367 at pp 392, 393 by Lord Wilberforce who illuminated further:

4. A true rescission is a rescission *ab initio* such as may arise for example in cases of mistake, fraud or lack of consent, in which the contract is treated in law as never having come into existence;

5. In the case of an accepted repudiatory breach, the contract has come into existence but has been put an end to or discharged; and

6. It is now quite clear that under the general law of contract, acceptance of a repudiatory breach does not bring about rescission *ab initio.*

Gopal Sri Ram JCA in a judgment delivered for the Court of Appeal in *Abdul Razak bin Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231 crystallized further as follows:

7. True rescission is a specific relief and is available to a litigant either as a self help upon satisfaction of certain conditions (see *Car & Universal Finance Co Ltd v. Caldwell* [1961] 1 QB 525) or as a judicial remedy obtainable in an action;

8. Rescission was invented by the Court of Chancery and now finds its place in Chapter IV of our Specific Relief Act 1950;

9. Rescission has the effect of setting at naught the contract void *ab initio* and not merely as to obligations *de futuro*;

10. Rescission places the parties on a footing as though a contract had never been made; and

11. Terminating the act of future obligations under a contract and true rescission are two different acts altogether.

Bearing the above principles in mind, it is appropriate for me to refer to a similar fact-situation which arose in *Yap Sew Lim lwn. Pulau Kembar Sdn Bhd* [2005] 7 CLJ 340 HC. That action was commenced in the sessions court. The plaintiff's claim against the defendant was based on a SPA under which he had paid RM215,200 representing 80% of the purchase price. On the due date for completion and delivery of the unit of shop office, the defendant defaulted. The plaintiff then terminated the SPA. The defendant contended that the plaintiff had claimed the remedy of rescission which was outside the jurisdiction of the sessions court. Abu Samah Nordin J after referring to the aforesaid authorities and in a well considered judgment held that the plaintiff's claim was not for rescission but was based on a termination by the innocent party upon the defendant's breach of the SPA.

I am in entire agreement with the learned judge's conclusion which I hereby apply. I therefore hold that the plaintiff's claim herein arose from its right as an innocent party to put an end to its future obligations under the SPA and so does not constitute a true rescission as provided for in s. 69(b). That being the case it is properly within the jurisdiction of the sessions court.

Proper Defendant

The second defendant raised the issue pertaining to the absence of privity of contract and that the second defendant was not a proper defendant in view of cl. 4 in the SPA.

The stand taken for the plaintiff is that the second defendant is the registered proprietor who has executed the SPA and so there was privity of contract.

In my judgment, there can be no doubt that the rights and obligations of the parties are contained in the SPA.

It is pertinent to note that the plaintiff as purchaser has paid the purchase price to the vendor under cl. 4. The completion and handing over of vacant possession of the unit is the obligation of the first defendant as the vendor under cl. 20, which also provides for liquidated damages in the event of the first defendant's failure to do so as the vendor in that respect.

Whether or not the second defendant as the registered proprietor of the lands can be held liable under the SPA is not plain and obvious, as it would involve an issue pertaining to privity of contract. It is significant to note that such an issue has been resolved by way of a full trial, as in *Kepong Prospecting Ltd & Iors v. Schmidt* [1968] 1 MLJ 170, and not by way of summary judgment.

In *Hospital Pantai Ayer Keroh Sdn Bhd v. Lu Wei Hong* [2005] 4 MLJ 155, there was an application for summary judgment and the issue of the absence of privity of contract was raised. Applying the Privy Council judgment in *Kepong Prospecting Ltd*, *supra*, I held that it was not a plain and obvious case for summary judgment.

Conclusion

By reason of the above grounds, I hold that the liability of the second defendant under the SPA is an issue which ought to be tried. In the circumstances, I hold that the learned sessions judge had erred in entering summary judgment against the second defendant. I therefore allow this appeal, set aside the order of the court below and order that an early date be fixed for the hearing of the action in the sessions court.

Costs

As I have sustained the plaintiff's response to the issue of rescission and the defendant's submission asking for the summary judgment to be set aside, their legal position in relation to costs has been put in equilibrium, in which case I order each party to bear its own costs.